No. 19-56161

In the

United States Court of Appeals

For the Ninth Circuit

CHELSEA HAMILTON; ALYSSA HERNANDEZ,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

WAL-MART STORES, INC., a corporation;
WAL-MART ASSOCIATES, INC., a corporation;
DOES, 1 through 50, inclusive,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable Andre Birotte, Jr., District Judge
Case Nos. 5:17-cv-1415 & 5:17-cv-1485

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL RETAIL FEDERATION, AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *amici curiae* the Chamber of Commerce of the United States of America, National Retail Federation, and Retail Litigation Center, Inc., each certifies that it has no parent corporation, and no publicly held company has 10% or greater ownership in it.

Dated: August 15, 2022

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interest of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Established in 1911, the National Retail Federation (NRF) is the world's largest retail trade association. Retail is by far the largest private-sector employer in the United States. It supports one in four U.S. jobs—approximately 52 million American workers—and contributes $3.9 trillion to annual GDP. NRF regularly files *amicus curiae* briefs in cases that raise issues of substantial importance to the retail industry.

The Retail Litigation Center, Inc. provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of the intention to file this brief over 10 days prior to the due date and all parties have consented to the filing of this brief.

industry-wide consequences of significant court cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in nearly 200 cases of importance to retailers. The Retail Litigation Center is the only trade association dedicated solely to representing the Nation's retail industry in the courts. Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

Amici have a strong interest in the fair and efficient resolution of claims under California's Labor Code Private Attorneys General Act (PAGA). Many of *amici's* members are employers in California and thus subject to PAGA's provision permitting an employee to seek relief on behalf of himself or herself and other employees. Moreover, as lawyers have discovered PAGA as a vehicle to pursue massive judgments with fewer procedural constraints, it has been increasingly used to extract settlements through unfounded demand letters and unwieldy complaints.

The panel opinion would only exacerbate that problem by undermining the ability of district courts to ensure the fair resolution of PAGA claims. The district court found that there was no manageable way to adjudicate the claims in this suit. Yet the panel concluded that the district court was without inherent authority to dismiss them. This holding will increase the pressure on employers to settle even nonmeritorious PAGA actions to avoid extended and expensive litigation. And it

will force district courts to move forward with cases where there is no reasonable and efficient method to resolve the claims. This Court should review the panel's decision and reaffirm the authority of district courts to manage their dockets.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for rehearing or rehearing en banc in this case asks the court to review a vitally important question: whether a district court has the inherent authority to dismiss unmanageable claims brought under California's Labor Code Private Attorneys General Act (PAGA). That Act deputizes an "aggrieved employee" to act as a private attorney general for the State, seeking penalties "on behalf of himself or herself and other current or former employees" for certain violations of the Labor Code. Cal. Lab. Code § 2699(a). But what really sets PAGA apart is that, at least as interpreted by the California courts, an "employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. __, __, 142 S. Ct. 1906, 1915 (2022). "This mechanism radically expands the scope of PAGA actions." *Id.* Yet the panel appeared to hold that, no matter how unmanageable a PAGA suit, a district court is powerless to dismiss its claims.

That erroneous holding would harm both employers and district courts, while failing to serve the purposes of PAGA. As the Supreme Court recently recognized, "PAGA suits 'greatly increas[e] risks to defendants.'" *Id.* at 1921. The welding together of disparate low-value claims into a single high-value suit places immense pressure on employers to settle. Removing one of the most important tools in the

toolbox to address an unmanageable claim will only exacerbate that pressure. District courts, too, will feel pressure as they try to manage the unmanageable. And none of this will materially benefit the employees, since most PAGA settlements primarily benefit the plaintiffs' lawyers.

The panel opinion made two significant errors. First, the panel opinion focused myopically on Rule 23 as the primary source of authority for managing class actions, rather than the inherent authority of a district court to manage its docket. Second, the panel opinion reasoned that PAGA's purpose of enforcing California's labor laws was not compatible with the power to dismiss unmanageable cases; but the same could be said about any number of other long-established inherent powers—like contempt—that can prevent a plaintiff from prevailing on a claim.

While the panel's opinion merits en banc review, the panel should, at a minimum, grant rehearing to clarify that district courts retain other inherent powers to make a PAGA action manageable. No other court—even courts concluding that a claim cannot be dismissed for unmanageability—has suggested that a district court lacks any inherent powers to resolve manageability concerns in a PAGA case. The panel should clarify that a district court has inherent power to take other actions, short of dismissal, that ensure the manageable litigation of a PAGA action.

ARGUMENT

I. The petition for rehearing en banc will cause significant harms to employers and district courts without meaningfully aiding employees.

This question presented for rehearing is exceptionally important to businesses, the courts, and employees. Employers already face substantial pressure to settle PAGA actions. The panel's opinion will exacerbate that pressure by permitting even the most unmanageable PAGA claims to proceed. District courts, too, will bear the brunt of dockets laden with suits that have no path to an efficient resolution. These costly cases will not meaningfully benefit employees, but instead serve to benefit plaintiffs' attorneys in settlement negotiations.

A. Unmanageable PAGA claims would burden employers.

PAGA claims impose massive pressure on employers to settle. PAGA permits an employee to bring a civil action for certain labor code violations "on behalf of himself or herself and other current or former employees." Cal. Lab. Code § 2699(a). And at least as interpreted by the California courts, the employee is not limited to asserting the violation that he or she experienced on behalf of others, but may instead "use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability." *Viking River Cruises*, 142 S. Ct. at 1915. To make a potentially complex suit even more risky, PAGA authorizes the employee to pursue civil penalties of $100 per employee for each pay period for a first violation and $200 for later violations. Cal. Lab. Code § 2699(f)(2). These

relatively modest penalties can swiftly be compounded into a massive judgment. "Even a conservative estimate would put the potential penalties in [PAGA] cases in the tens of millions of dollars." *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013). In fact, the potential fines faced by an employer in some PAGA cases are substantially higher than the actual damages that would have been awarded in a class action involving the same conduct. *See* Matthew J. Goodman, *Comment: The Private Attorney General Act: How to Manage the Unmanageable*, 56 Santa Clara L. Rev. 413, 415 (2016).

The massive potential liability and litigation costs create immense pressure to settle. An employer defending a PAGA claim may choose to settle even a weak claim because of the "unacceptable" risk of a "devastating loss" created when claims brought on behalf of "tens of thousands of potential claimants are aggregated and decided at once." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Like class actions, PAGA claims alleging violations against a "large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Judge Friendly called these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The risk of a massive loss means that "even a complaint which by objective standards may have very little chance of success at trial has a settlement

value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.").

It is thus no surprise that PAGA has become an increasingly attractive vehicle for plaintiffs' attorneys since PAGA's passage in 2004. In 2005, plaintiffs filed only 759 PAGA claims. Emily Green, *State law may serve as substitute for employee class actions*, L.A. Daily J. (Apr. 17, 2014). By April 2019, the California Labor & Workforce Development Agency projected that more than 6,000 PAGA notices would be filed in the 2019/2020 fiscal year and that the number would continue to rise, topping 7,200 in fiscal year 2022/2023. *See* Cal. Dep't of Industrial Relations, *Budget Change Proposal* – PAGA Unit Staffing Alignment 7 (Apr. 2, 2019), *available at* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf. And that number does not account for the many more demand letters that are sent each year and used to extract settlements, particularly from smaller or less sophisticated employers. *See* Baker & Welsh, LLC, *California Private Attorneys General Act of 2004: Outcomes and Recommendations*, 1, 3 (Oct. 2021) *available at* https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf.

The panel's opinion would only increase the potential for PAGA abuse. It would allow an employee to present a complex suit seeking a massive award with no practical way for the court to fairly adjudicate the merits. Faced with the risk that a district court would respond by relieving the employee of his or her burden of proof, denying the employer its right to present individualized defenses, or holding a trial of such length and complexity that the defense costs would make even the lawyers blush, employers will face outsized pressure to settle.

The facts of this case demonstrate the problem. One employee sought PAGA penalties for thousands of employees based on the time that it took them to go through security checkpoints. But the amount of time that it took individual employees to navigate these checkpoints varied substantially. 3-SER-675. In the absence of any way to reach a decision for all employees without looking to individualized evidence, the district court found that there was no manageable way to adjudicate the claim. This panel's decision, however, would apparently put the employer to the choice: settle or defend against these unmanageable claims, with significant potential penalties on the line.

Moreover, the panel's opinion might encourage plaintiffs' attorneys to pursue unmanageable suits. Settlement pressure is not the result only of the large potential judgment but also the complexity and cost of litigation. *See Coopers & Lybrand*, 437 U.S. at 476 (explaining that a "large class may so increase the defendant's

potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"). By denying district courts the most appropriate tool for addressing an unmanageable PAGA claim, the panel opinion increases the incentives for plaintiffs' attorneys to bring these claims.

B. Unmanageable PAGA claims would burden the district courts.

Employers will not be the only ones harmed by the panel opinion's rule. An onslaught of unmanageable PAGA claims would also freight the district courts. Precedent has long recognized the needs of courts "to manage their own affairs." *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)). Thus, a court uses a number of inherent powers "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). The panel's opinion would hamstring these efforts.

Absent authority to dismiss unmanageable PAGA actions, district court dockets will become even more bogged down than they already are. Worse, these harms will be felt most keenly in federal district courts currently facing judicial emergencies. *See* United States Courts, Judicial Emergencies, *available at* https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (listing emergencies in each district court in California). Such judicial backlogs hurt not

only the courts, but other litigants whose claims are put on the back burner while scarce resources are dedicated to trying to manage the unmanageable.

Again, this case highlights the problem. The district court found that a claim based on time spent going through security would involve too many individualized determinations to be manageable. 1-ER-288–89 & n.15. The panel would disregard that conclusion, placing the court in the untenable situation of trying to resolve an action involving thousands of individual inquiries while managing the hundreds of other cases on the court's docket.

C. Employees would not benefit from unmanageable PAGA actions.

The panel's decision offers no countervailing benefit to employees. Plaintiffs' attorneys, not employees, are likely to be the primary beneficiaries of the increased settlement pressure resulting from this rule. The data of California's own Labor & Workforce Development Agency proves the point. According to that agency's review of 1,546 PAGA settlement agreements from fiscal years 2016 to 2018, 75 percent "fell short of protecting the interests of the state and workers" and "reflect[]the failure of many private plaintiffs' attorneys[.]" DLSE FY 19/20 Budget Change Proposal, Analysis of Problem (May 10, 2019), at 1, 6, *available at* https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.

Even in rare cases where unmanageable PAGA claims are litigated to final judgment—with all of their attendant burdens on the defendant and the court—that

litigation would not protect the interests of employees. One recent study found that California businesses paid an average of $1,232,000 per case when a claim was litigated to final judgment. CABIA Foundation, California Private Attorneys General Act of 2004 (Mar. 2021), at 1, *available at* https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf. Even though this recovery exceeded the average paid by employers in agency-decided cases, *employees recovered only about half as much, with much of that disparity caused by payments to the plaintiffs' attorneys*. *Id*. And it took around 50% longer for employees to recover in court. *Id*.

Even worse, PAGA lawsuits often lead to layoffs and business closures. We know that because large employers in California are required to file a Worker Adjustment and Retraining Notification with the California Employment Development Department at least 60 days before a mass layoff or closure. From 2014 to 2020, over one hundred businesses filed these notices within eighteen months of receiving a PAGA notice. *See* Cal. Bus. & Indus. Alliance, PAGA Claims Contribute to Employee Layoffs in California, *available at* https://www.cabia.org/app/uploads/PAGA-WARN-analysis_5-converted.pdf.

The California Legislature itself has acknowledged that PAGA can be abused. In 2018, for example, the Legislature noted that PAGA "can easily be abused, especially by . . . unscrupulous plaintiffs' attorneys. In the hands of these attorneys . . . PAGA enables 'gotcha' lawsuits in which employers find themselves tied up in

expensive litigation and confronting significant penalties and attorney's fees awards for what they feel are very technical or trivial violations, at best." June 25, 2018 Sen. Jud. Comm. Rpt. on A.B. 1654 (2017–18 Reg. Sess.). The Legislature thus exempted some workers from PAGA's requirements, while conceding that it would "be difficult, from a policy point of view, to rationalize denying future requests for PAGA exemptions under similar circumstances." *Id*.

In sum, there is little reason to suspect that requiring district courts to allow unmanageable PAGA actions to proceed to trial will materially benefit employees. If anything, the evidence suggests that an increase in settlement pressure in this context will benefit plaintiffs' attorneys at the expense of the employees.

II. The panel opinion turned on an unduly narrow view of inherent powers.

Two significant errors infected the panel opinion's analysis. First, the court took the short-sighted view that a manageability standard comes from Rule 23(b)(3) and would not be a reasonable response to a specific problem in PAGA actions because those actions are structured differently from Rule 23(b)(3) class actions. Second, the court found that imposing a manageability standard would be an improper use of inherent powers because it would conflict with the purposes of PAGA. Each of these conclusions is wrong.

To begin, the panel opinion mistakenly believed that Rule 23(b)(3) would have to serve as the source of a manageability standard. But the need for judicial

manageability flows from the principles supporting the inherent authority of courts. Courts have inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Dietz*, 579 U.S. at 45 (quoting *Link*, 370 U.S. at 630–31). This inherent authority includes the ability to dismiss cases when necessary. *Id*. It follows from these principles that a district court has the inherent authority to dismiss a case when its resolution cannot be managed. Nothing about the fact that Rule 23 includes a similar requirement undermines these principles.

For this reason, courts that have imposed a manageability standard on PAGA actions have not looked to Rule 23 to do so. For example, *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746, 765 (Cal. Ct. App. 2021), relied on "principles of the courts' inherent authority to manage litigation" to hold that "courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable." The California Court of Appeal acknowledged that class action requirements do not apply to PAGA claims, but explained that this did not mean that "any consideration relevant to class action certification is necessarily irrelevant in the context of PAGA." *Id*. at 861.

The panel opinion similarly erred in concluding that the exercise of the district court's inherent power would conflict with the purposes of PAGA. The panel

reasoned that the purpose of PAGA is to enforce the labor laws, and thus district courts should not impose a hurdle on a PAGA plaintiff that they could not impose on the state if it were pursuing enforcement. There is no support, however, for the assertion that district courts could not also require the state's civil enforcement actions to be manageable. Like any other litigant, the state is subject to the court's inherent powers. *See, e.g.*, *Cavillo Manriquez v. Devos*, 411 F. Supp. 3d 535, 539–40 (N.D. Cal. 2019) (holding government party in civil contempt). And the panel opinion's reasoning that enforcement might be more difficult with a manageability requirement would undermine any application of inherent powers. For example, the contempt powers of courts are well established. But application of those contempt powers against a plaintiff seeking to invoke a statutory right—like the rights at issue in PAGA suits—would not advance the purpose of those statutory rights.

III. In the alternative, the Court should clarify that district courts retain broad inherent authority short of dismissing PAGA claims.

At a minimum, the Court should grant rehearing to clarify that district courts may exercise other inherent powers to manage PAGA actions. The panel opinion held that a district court could not invoke a manageability standard to dismiss a PAGA claim. But the opinion also said that "[i]t would be . . . inappropriate to allow federal courts to treat a freestanding manageability requirement as a dispositive consideration in PAGA cases." Op. 23; *see also* Op. 23 ("Imposing a manageability requirement in PAGA cases would also contradict the purposes of

PAGA by undermining the key features of a PAGA action, rendering it an improper exercise of a court's inherent powers.").

Even courts that have concluded that a PAGA claim cannot be dismissed have not gone so far. In fact, the only California decision finding that a PAGA claim cannot be dismissed because of manageability went out of its way to highlight other steps that a court could take to render a PAGA action manageable. In *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal. App. 5th 685, 713 (Cal. Ct. App. 2022), the California Court of Appeal stated that a trial court could take other steps to avoid litigation that would be "unduly expensive, impractical, and place far too great a burden on our already busy trial courts." These steps included "limit[ing] witness testimony and other forms of evidence when determining the number of violations that occurred and the amount of penalties to assess." *Id*. As a result, a PAGA plaintiff in a case calling for individualized evidence could "have difficulty proving purported violations suffered by other employees." *Id*. Plaintiffs who failed to "work with trial courts during trial planning to define a workable group or groups of aggrieved employees for which violations can more easily be shown" would face the "risk [of] being awarded a paltry sum." *Id*.

Even if this Court chooses not to rehear this appeal en banc, it should grant rehearing and clarify that district courts retain broad inherent powers to manage a PAGA case short of dismissal. Without this clarification, the panel's opinion could

be read to limit other attempts by district courts to resolve PAGA actions in a manageable way. That result would only further exacerbate the costs imposed on employers, courts, and employees by the panel's decision.

CONCLUSION

The Court should grant rehearing en banc or panel rehearing.

Dated: August 15, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because the brief contains 3,713 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point size Times New Roman font.

Dated: August 15, 2022

/s/ Gilbert C. Dickey
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Counsel for Amici Curiae *Chamber of Commerce of the United States of America, Retail Litigation Center, and National Retail Federation*

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

Dated: August 15, 2022

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